UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 97-72-P-H***
	)	
DENNIS FRIEL,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON MOTIONS TO SUPPRESS

The defendant is charged with conspiracy to possess with intent to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 846. He seeks the suppression of evidence seized from him by investigators at the arrest scene (Docket No. 19) and of statements made by him to the authorities following his arrest (Docket No. 18). An evidentiary hearing was held on March 3, 1998 at which the defendant appeared *pro se* with the assistance of standby counsel.[1] The defendant opted to testify at the hearing and was cross-examined by the government. I recommend that the following findings of fact be adopted and that the motions to suppress be denied.

---

[1] The defendant has filed an objection (Docket No. 44) to my presiding at the suppression hearing on the ground that his motions are outside the jurisdiction conferred on magistrate judges by 28 U.S.C. § 636. I denied this objection on the record at the beginning of the hearing. By way of full explanation, the court has exercised its authority to designate me to conduct an evidentiary hearing on the suppression motions and to issue "proposed findings of fact and recommendations for the disposition[] by a judge of the court." *Id*. at subsection (b)(1)(B). As noted at the conclusion of this opinion, my determination is subject to *de novo* review by the court. *Id*. at subsection (b)(1). The defendant's objection also reprises certain additional positions he took in a previous motion he filed that sought my recusal (Docket No. 24). I denied the recusal request and the court denied the defendant's appeal of my decision. *See id.* at 3 (endorsement) and Docket No. 34 (endorsement). There is no basis for revisiting this determination here.

I. Proposed Findings of Fact

In the early afternoon of April 17, 1997, Agent John Dumas of the Maine Drug Enforcement Agency ("MDEA") learned from a confidential informant that the defendant planned to travel from his home in Portland to Lowell, Massachusetts to buy heroin. MDEA Agent George Connick then left Portland in his car for Lowell, while other agents placed the defendant's home under surveillance and gave the confidential informant $110 with which to purchase drugs from the defendant. The informant gave the money to the defendant to buy heroin and the defendant left soon thereafter in a vehicle registered to his wife. The defendant was in the passenger seat; driving was a friend of the defendant, David Cherkis.

Followed by several MDEA agents, the defendant's vehicle proceeded southbound on the Maine Turnpike to Biddeford, exited there and made a brief stop at a local pet store, thereafter resuming its southbound journey with Cherkis driving and the defendant in the passenger seat. The car traveled through New Hampshire on Interstate 95 and, once in Massachusetts, proceeded westbound on Interstate 495. At some point, the car made a brief stop so the defendant could put water in the radiator.

As the defendant's vehicle entered the Haverhill, Massachusetts area, agents of the Cross-Border Initiative ("CBI")[2] task force took over the task of covertly pursuing the defendant's car, with the MDEA agents following behind their CBI counterparts. The defendant's vehicle exited at Lowell and made a stop at a convenience store-gas station where the defendant placed a brief call at a pay phone. The defendant's vehicle then left the store and proceeded to an apartment building on Pratt

[2] The CBI is a cooperative anti-drug program based in Lowell and involving federal, state and local law enforcement authorities.

Street in Lowell known by CBI agents to be the site of frequent illegal drug activity. There, the defendant was observed by CBI Agent Peter Kelleher giving cash to a woman and receiving something wrapped in clear plastic from her. The defendant's car then traveled approximately 1 1/2 miles to a donut shop where Cherkis got out of the vehicle and entered the store.

At this point, the CBI agents began assembling themselves for the purpose of arresting the defendant and Cherkis; the MDEA agents waited in a parking lot a short distance away. Because the defendant had two previous convictions involving firearms, the agents considered him potentially armed and dangerous. Several minutes went by and the defendant, growing impatient with Cherkis, went into the donut shop to look for his companion. The defendant did not see Cherkis inside — he was apparently in the bathroom — so the defendant returned to his car in the store's parking lot and snorted three bags of heroin using a straw from the donut shop. Soon thereafter, approximately ten CBI agents moved in with weapons drawn and arrested the defendant as he sat in his car. Cherkis was also arrested before he could return to the vehicle.

The defendant's arrest was not a peaceful one and there was conflicting testimony at the hearing concerning what transpired. According to the defendant, the agents shoved him to the pavement and screamed threats at him as the defendant demanded to speak with an attorney. Kelleher testified that the defendant resisted arrest, required two officers to subdue him and did not say anything about wanting to speak to a lawyer. Both the defendant and Kelleher testified that one of the agents used pepper spray to subdue the defendant, the defendant claiming that the spray was used after he was handcuffed with his hands placed behind his body and Kelleher stating that it was used before. After considering the testimony of the witnesses, I find that Kelleher's version of events is the more credible one and, thus, that the defendant did not seek to invoke his right to

counsel as he was being arrested.

The agents obtained some water and used it to wash the pepper spray from the defendant's face. It was approximately at this point that the MDEA agents, including Dumas, arrived at the arrest scene. Again, what transpired next was the subject of conflicting testimony at the hearing. According to the defendant, the CBI agents conducted a pat-down search of his body and a search of his car, found nothing, and became angry about not turning up any contraband — and the defendant, intimidated, indicated by raising his right foot that the agents should look in that area again. The defendant testified that it was only at this point that the agents, after first looking in his right shoe, ultimately discovered the heroin he was hiding in his right sock. Kelleher testified that the agents simply conducted a routine search of the vehicle and the defendant as part of their arrest procedure and found the contraband in the defendant's sock. According to Kelleher, one of the agents at the scene had observed the defendant bend down to that area of his body while seated in the car prior to the arrest. I find Kelleher's account to be the more credible one.

Also disputed at the hearing was the time at which the defendant was formally advised of the rights secured to him under *Miranda v. Arizona*, 384 U.S. 436 (1966). According to Kelleher's testimony, he initiated discussions at the arrest scene with the defendant about the defendant's potential cooperation with the authorities, at which point Agent George Connick of the MDEA suggested that Kelleher administer *Miranda* warnings prior to any further discussions. Kelleher testified that he then pulled an orange "*Miranda* card" from his wallet,[3] read the warnings aloud to the defendant and asked him whether he wished to speak to the investigators. Kelleher testified that the defendant then affirmatively indicated that he wanted to talk to the agents. According to

[3] The card appears in the record as Government Exhibit 1.

Kelleher, he then asked the defendant to sign the card. Kelleher testified that the defendant did, in fact, affix his signature to the card — something he was able to do because the agents had previously moved his handcuffed arms from the back to the front of his body so as to make the defendant, a large man, more comfortable — using a shelf attached to a pay phone, located near the defendant's car, as support. The testimony of Dumas and Connick is consistent with Kelleher's version of these events. However, the defendant testified that he never received *Miranda* warnings at the scene. He stated that he has no memory of ever signing such a card and that he could not have signed the card because the "Dennis Friel" signature on Government Exhibit 1, though apparently his, is too neat to have been made by a person in handcuffs. The defendant testified that he recalls being asked by Kelleher or Dumas to sign a waiver of his *Miranda* rights, but that this took place much later following his arrival at Lowell police headquarters for booking. I find the agents' version of these events to be the more credible one and that, accordingly, the defendant was apprized of his *Miranda* rights at the beginning of his discussion of cooperation, which took place at the scene of his arrest.

The defendant's agreed-upon cooperation entailed his telephoning his heroin supplier from the same parking lot pay phone in an effort to consummate a monitored drug transaction. However, the defendant was unable to reach his supplier after attempting to do so. He was then transported to the Lowell police headquarters for booking, arriving there at approximately 6:00 p.m.[4] At the police station, following his booking, the defendant submitted to an interview by Dumas. The MDEA agent began the conversation by showing the defendant the *Miranda* card, reminding the

[4] The defendant testified at hearing that all of the events in Lowell, including the booking, took place substantially earlier than the agents suggested in their testimony and written reports. I find the agents' assertions as to the timing of the events in question to be credible. These assertions are consistent with the notation on Government Exhibit 1 that the defendant received his *Miranda* warnings at 5:45 p.m.

defendant that he had signed it, and asking the defendant if he was still willing to discuss the case. The defendant explicitly agreed to speak with Dumas. He told the agent that he was using approximately 4-5 "bags" of heroin per day, that he had snorted three bags just prior to his arrest, and that his heroin addiction was such that he no longer used the drug to get high but simply to avoid being sick from withdrawal. The defendant told Dumas that he had purchased 75 bags that day in Lowell and, in addition to the three bags he had used himself, had given three to Cherkis as payment for his driving services. This is consistent with the 69 bags the authorities recovered from their search of the defendant. The defendant told Dumas the price he had paid for the heroin, and Dumas mentioned certain Maine-based individuals by name to the defendant, some of whom the defendant acknowledged having supplied with heroin.

Dumas, Kelleher and Connick all testified that once the defendant had an opportunity to recover from the effects of the pepper spray, he was calm, polite, coherent and cooperative with the authorities, both at the scene of his arrest and at the police station thereafter. Each of the agents testified that the defendant did not appear to be under the influence of drugs or otherwise impaired. This is consistent with the defendant's own characterization of his heroin habit, as related both to Dumas and in his hearing testimony, as one in which he takes the drug to avoid withdrawal rather than to get high. Nevertheless, the defendant testified at hearing that the only point after his arrest in which he was in full possession of his faculties was the juncture immediately after the arresting officers arrived and handcuffed him. Soon thereafter, according to the defendant, the effects of the heroin he had just taken were such that his apparent docility was, in reality, a drug-induced haze that persisted through his interview with Dumas. After considering the conflicting testimony offered at hearing, I find that the defendant was in full possession of his faculties at all relevant times and

recommend that the court so determine.

II. Discussion

The defendant's two suppression motions concern themselves with physical evidence and statements, respectively. His motion to suppress "evidence taken from the accused at the scene of the arrest," Motion to Suppress the Evidence, etc. (Docket No. 19) at 1, relates to the contraband taken from the plaintiff at the scene. His motion to suppress "any and all statements made by the accused following his arrest," Motion to Suppress Statement, etc. (Docket No. 18) at 1, relates both to statements made at the arrest scene and during his subsequent interview at the police station with Dumas. As a preliminary matter, and notwithstanding certain assertions in the defendant's reply memorandum concerning the legality of the arrest itself, I note that the defendant affirmatively indicated at the hearing (after consulting with standby counsel) that he concedes the agents had probable cause to conduct the arrest itself.

It is well-established that arresting officers may conduct a "full search" of a suspect incident to an otherwise lawful arrest. *United States v. Robinson*, 414 U.S. 218, 235 (1973). The defendant's position is that the agents discovered the heroin not by conducting the kind of search permitted by *Robinson*, but by violating his *Miranda* rights in a manner that allowed them to wring an improper disclosure from him as to the location of the contraband. According to the defendant, the evidence must therefore be suppressed under the "fruit of the poisonous tree" doctrine. As I have already noted, based on my assessment of the credibility of the witnesses who testified at the hearing, I do not adopt this version of what transpired. Moreover, even if the agents had first learned of the heroin's whereabouts from a disclosure that might have violated the defendant's *Miranda* rights, I

would conclude that the evidence would inevitably have been discovered by the agents during their search of the defendant and would thus be admissible pursuant to the rule set forth in *Nix v. Williams*, 467 U.S. 431, 447 (1984). Such a conclusion is based on my determination that any statements made by the defendant that tended to suggest the location of the heroin preceded rather than followed the search, notwithstanding the defendant's testimony to the contrary.

Concerning the admissibility of the defendant's statements themselves, the Supreme Court has declared that a suspect may waive his *Miranda* rights "provided the waiver is made voluntarily, knowingly and intelligently." *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (citation and internal quotation marks omitted). It is the government's burden to establish the voluntariness of such a waiver by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 167-68 (1986). Not only must the government show that the waiver "was the product of a free and deliberate choice rather than intimidation, coercion, or deception," but it must also demonstrate that the defendant acted "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran*, 475 U.S. at 421.

I conclude that the government has made the requisite showing. The defendant does not contend that he was suffering from the effects of heroin withdrawal at any time from his arrest through his interview with Dumas. *Cf. United States v. Sutherland*, 891 F.Supp. 658, 663-64 (D.Me. 1995) (discussing potential effects of heroin withdrawal on voluntariness). The extent to which one is otherwise under the influence of alcohol on drugs certainly has a bearing on the voluntariness determination, but a court may reject self-serving assertions by the defendant about the effect of the drugs when there is credible evidence that the defendant appeared to have been in full possession of his mental faculties when he made his statements. *See, e.g., United States v. Montgomery*, 14 F.3d

1189, 1195 (7th Cir. 1994); *Medeiros v. Shimoda*, 889 F.2d 819, 823 (9th Cir. 1989); *United States v. Hogan*, 933 F.Supp. 1008, 1017 (D.Kan. 1996). Given the evidence adduced at hearing, such a determination is more than appropriate here.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motions to suppress evidence be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 8th day of March, 1998.

_____

David M. Cohen
United States Magistrate Judge